Petition

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-5848

LARRY GILBERT AND
J. D. GLEATON,

PETITIONERS,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

I. Are the Double Jeopardy and Cruel and Unusual Punishments Clauses of the United States Constitution violated by a death sentence which rests on a resentencing jury's finding of two aggravating circumstances, where one of those aggravating circumstances had been considered and rejected by the jury at the first trial?

II. Does a sentence of death violate the Eighth Amendment where it rests upon a jury's having found and considered two separate statutory aggravating circumstances, one of which circumstances is later determined on appeal to have been a lesser included circumstance of the other?

III. When reviewing the proportionality of a death sentence, must a state supreme court compare the case under review with other available factually similar capital cases, whether the death penalty was imposed in such cases or not?

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INTRODUCTION

The petitioners, Larry Gilbert and J. D. Gleaton, respectfully pray that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court entered in this case on October 9, 1981 on grounds that important questions of federal constitutional law are present on which there are conflicting decisions by the highest courts of other states and United States Circuit Courts of Appeals. Additionally this case presents a similar issue to Zant v. Stephens, No. 81-89, cert. granted, 30 Cr. L. Rptr. 4001 (10-5-81).

OPINION BELOW

The first opinion of the South Carolina Supreme Court is unreported and appears as Appendix A. The "amended" opinion appears as State v. Gilbert, 283 S.E. 2d 179 (S.C. 1981) and is attached as Appendix B. The order of the South Carolina Supreme Court denying the petition for rehearing is unreported and appears as Appendix C.

JURISDICTION

The judgment of the South Carolina Supreme Court was rendered on September 14, 1981. The petitioners filed timely petitions for rehearing which were denied on October 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(S. C. Code §§ 16-3-20 and 16-3-25 comprise the death penalty statute in South Carolina. Due to their length, these statutes are omitted here and attached as Appendix F).

U.S. Constitution, Amendment V:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Constitution, Amendment VIII:

> "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In 1977 the Petitioners were indicted for and convicted of murder and armed robbery as a result of the July 12, 1977 death of Ralph Stoudemire, a South Congaree, South Carolina service station operator. During the penalty phase of this 1977 trial, the State presented testimony to prove and relied upon two statutory aggravating circumstances in support of its request that the death penalty be imposed. The aggravating circumstances of (a) robbery while armed with a deadly weapon, and (b) larceny with use of a deadly weapon were defined and explained by the trial judge in his instructions. The statutory aggravating circumstances were also listed in written form and given to the jury along with written statutory instructions for use during its deliberations. The jury subsequently recommended imposition of the death penalty, but it found the existence of only one aggravating circumstance -- robbery while armed with a deadly weapon -- to have been proven beyond a reasonable doubt. (State v. Gilbert I, TR 888, 939-940.)

Petitioners' death sentences were reversed by the South Carolina Supreme Court due to improper jury argument by the solicitors (State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979)), and their cases were remanded for a new sentencing trial. At the second sentencing trial, the State again presented and relied on both the statutory aggravating circumstances which had been submitted to the jury at the first sentencing trial, notwithstanding the fact that the first jury had failed to find one of these aggravating circumstances beyond a reasonable doubt. The state's evidence in aggravation at the re-sentencing trial tended to prove that there had been a robbery of the deceased, and additionally that the petitioners had stolen a

wallet belonging to the wife of the deceased from a back room at the service station.

The State's intent to prove the existence of two separate and distinct statutory aggravating circumstances was plainly stated to the jury in the opening remarks by the solicitor (Tr. p. 1230). The State proceeded to attempt to prove the "armed robbery" of Ralph Stoudemire by the testimony of his daughter, Cheryl Stoudemire (Tr. pgs. 1289-1293). Miss Stoudemire testified that she did bookkeeping at the service station (Tr. p. 1289) and that after her father's death, she did an accounting and determined that approximately two hundred ($200.00) dollars was missing (Tr. p. 1292). The testimony presented by the State to prove the "larceny" was a little more involved. The petitioners had both given statements to the police after arrest admitting having taken the wallet and having thrown it out of the car while driving down the road. The State presented Lowan L. Jamison, who testified that he found the wallet with Betty J. Stoudemire's name in it and mailed it back to her (Tr. pgs. 1371-1375). The deceased's son, Marion L. Stoudemire, testified that he remembered his mother leaving her wallet at the service station. He further testified that he watched his father place the wallet in a box in the back room of the service station (Tr. pgs. 1375-1380). Betty J. Stoudemire, wife of the deceased, then testified that she left her wallet at the service station the day her husband was killed and that it contained twenty ($20.00) dollars (Tr. pgs. 1380-1387).

It was obviously the State's intent to prove the two separate and distinct statutory aggravating circumstances and it went to some detail to do so. In the trial judge's instructions, the jury was told that it could consider the two

aggravating circumstances presented and relied upon by the State. The trial judge defined and explained the elements of both aggravating circumstances to the jury (Tr. pgs. 1531-1536) and submitted both of them in writing for the jury's consideration during deliberation. The jury returned its finding that both aggravating circumstances had been proven beyond a reasonable doubt and rendered the sentence of death. (Tr. pgs. 1550 and 1551).

During petitioner's appeal of their sentence, to the South Carolina Supreme Court, the claim that the submission, at the petitioner's sentencing hearing, of the aggravating circumstance of "larceny with use of a deadly weapon" violated the double jeopardy clause of the Fifth Amendment. The question presented by the Amicus Curiae was as follows: "Did the jury's consideration of both armed robbery and larceny as independent circumstances in aggravation of appellants' punishment constitute an arbitrary factor affecting their sentence of death or violate the Double Jeopardy Clause of the Fifth Amendment?" The issue was further argued by petitioners' counsel at oral argument. (Additional Brief of Respondent at 1). The Court considered the exception to have been timely raised and rendered its opinion (Appendices A and B) holding that double jeopardy was not violated.

Petitions for rehearing (Appendices G and H) were filed on September 24, 1981. In these Petitions, Petitioners timely raised the question of whether the South Carolina Supreme Court had failed to fulfill its ". . . obligation to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in which the death penalty was not imposed." (Apps. H and I). On October 9, 1981 the Petition for rehearing was denied as well as an application for stay of execution. (App. C) Stays

of execution were granted on October 21, 1981 by the Chief Justice of United States, pending disposition of this petition.

REASONS FOR GRANTING WRIT

I.

THE SUPREME COURT OF SOUTH CAROLINA HAS DECIDED THE DOUBLE JEOPARDY ISSUE IN DISREGARD OF THE PRINCIPLE OF BULLINGTON V. MISSOURI AND IN DIRECT CONFLICT WITH THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA ON THE IDENTICAL QUESTION.

This Court has recently held in Bullington v. Missouri, _____U.S._____, (May 4, 1981) that the protection of the Double Jeopardy Clause extends to a bifurcated capital sentencing procedure. Included within that protection is the principle that when the state has sought conviction on two charges but has succeeded only as to one, it may not resubmit both charges to a second jury should the defendant be granted a new trial. Benton v. Maryland, 395 U.S. 789 (1969). The failure of petitioners' first jury to find that the larceny aggravating circumstance had been proven beyond a reasonable doubt was in every significant respect the equivalent to an acquittal of the larceny circumstance, and accordingly the prosecution should not have been permitted to resubmit the identical charge to a second jury in hopes of securing a more favorable resolution of the factual issue of whether the murder had been committed while in the commission of larceny with use of a deadly weapon.

In rejecting this claim, the majority of the South Carolina Supreme Court reasoned that the first jury's failure to designate the larceny circumstance as having been proven beyond a reasonable doubt merely represented a "failure to find for or against him [sic] on that issue." 283 S.E.2d at 182 (emphasis in original). But as pointed out by Justice Harwell in dissent, this interpretation cannot be squared with either

the pertinent statutory authority or with the jury instructions actually given by the judge at petitioners' first trial. S.C. Code § 16-3-20(c)(1976) provides in part that

> The jury, if its verdict be a recommendation of death shall designate in writing. . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

[emphasis added] and the trial judge instructed the jury that if it recommended a sentence of death,

> . . . then you would be required to specify, in writing, in your recommendation the statutory aggravating circumstance or circumstances that you found to exist beyond a reasonable doubt. And I will submit to you, ladies and gentlemen, in the forms of sentences there is space provided - if you so find that there was a statutory aggravating circumstance, there is a space provided which you will write out the one that you find or both if you find both existed.

State v. Gilbert I, Tr. pgs. 927-927 (emphasis added). Thus under both South Carolina law and the trial judge's instructions, failure of the first jury to list larceny as a aggravating circumstance must be considered as a determination that that circumstance had not been proven beyond a reasonable doubt.

As an alternative ground for affirmance, the South Carolina Supreme Court reasoned that the petitioner's claim of a double jeopardy violation was without merit because "larceny is an essential element of the offense of robbery, as '[t]he common-law offense of robbery is essentially the commission of larceny with force.' " State v. Brown, 274 S.C.48, 49, 260 S.E.2d 719 (1979). The Court went on to hold that it was necessary for the jury to have found that petitioners had committed a larceny as well as finding the additional element that he used force to accomplish the larceny. 283 S.E.2d at 182. The record of petitioners' sentencing hearing reveals, however, that the robbery and larceny aggravating circumstances in this case rested upon separate and distinct transactions involving different victims and different items of property. For the state's evidence

established, on the one hand, an armed robbery of two hundred ($200.00) dollars from the deceased, and on the other hand, the larceny of the deceased's wife's wallet from a hiding place in a back store room. The presentation of these two separate offenses as distinct aggravating circumstances were calculated to and apparently did enhance the State's chances of obtaining a death sentence. Accordingly, it cannot fairly be said that on these facts the finding of larceny can be presumed from a finding of robbery, or that the first jury's failure to find the larceny circumstance may simply be disregarded. The North Carolina Supreme Court has recently decided the identical issue raised by the petitioners, here, and has reached the opposite conclusion from that reached by the South Carolina Supreme Court. In State v. Silham, _____N.C. _____, 275 S.E.2d 450 (1981) the court stated:

> If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstence or which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates a [sic] double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from. This would be tantamount to the state's having offered insufficient evidence of an essential element of a criminal offense in which case the state, because of double jeopardy considerations, could not retry the defendant even if it had sufficient evidence which could be offered at a new trial. Similarly the prohibition against double jeopardy would preclude the state from relying, at a new sentencing hearing, on any aggravating circumstance the existence of which the jury at the hearing appealed from, upon considering it, failed to find. The jury's failure to find the existence of the aggravating circumstance, after it had considered it, would be tantamount to defendant's having been acquitted of this circumstance.

The petitioners submit that this conflict in decisions between the courts of last resort of two states should be resolved in keeping with the Double Jeopardy principles enunciated by this Court in Benton v. Maryland and Bullington v. Missouri, and that their cases should be remanded for a constitutionally conducted resentencing.

II

THE DECISION BELOW INVOLVES A SIMILAR ISSUE TO ONE ON WHICH THIS COURT HAS GRANTED CERTIORARI IN ZANT V. STEPHENS, CERT. GRANTED NO. 81-89, _____U.S._____ (OCT. 5, 1981).

Stephens v. Zant, 631 F.2d 397 (5th Cir., 1980) modified, 648 F.2d 446 (5th Cir. 1981) involved a death penalty case in which multiple aggravating circumstances were presented to and found by the sentencing jury. One of the aggravating circumstances was held to be unconstitutional by the Georgia Supreme Court. The question was whether the death penalty imposed was invalid because the unconstitutional aggravating circumstance injected an arbitrary factor into the deliberations even though the other aggravating circumstances would have been sufficient to support the jury's imposition of the death penalty. The Fifth Circuit held that resentencing was required because "the process in which the death penalty was imposed in this case was not 'rationally reviewable.' " 631 F.2d at 406.

In the present case the submission of the larceny circumstance was violative of double jeopardy because the jury's failure to find its existence at the original sentencing trial precluded its resubmission at the new sentencing trial. However, assuming arguendo that the South Carolina Supreme Court's analysis that larceny necessarily was found by the first jury as an essential element of robbery its submission to the new jury was

improper because it duplicated what was in actuality only one aggravating circumstance.

The purpose of aggravating circumstances is to assist the jury in their determination of an appropriate punishment. It is to focus their attention on the legal blameworthiness of the crime. See, Gregg v. Georgia, 428 U.S. 153, 206 (1976). In Stephens, the defendant's prior record could have constituted a circumstance in aggravation had a constitutionally-drafted aggravating circumstance been available under Georgia law. But if larceny was present in the instant case only as an element or lesser included offense of the robbery, it could never have provided a separate basis for imposition of the death penalty. Here the submission of larceny focused the jury's attention on the same facts twice, giving them undue weight, and thus distorted rather than clarified the legal blameworthiness of the crime. As in Stephens there is no way of determining with certainty whether the weighing process was compromised and the jury's sentence would have been the same had it not considered the improper circumstance in aggravation.

III

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE PURPOSE AND SCOPE OF APPELLATE REVIEW OF DEATH SENTENCES.

The South Carolina death penalty statute was enacted in response to Gregg v. Georgia 428 U.S. 153 (1976) and is modeled after the Georgia statute considered in Gregg. See State v. Shaw, supra, 273 S.C. 194, 255 S.E.2d 799, 802 (1979). The South Carolina statute requires the state Supreme Court to review the imposition of the death penalty to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the

crime and the defendant." S.C. Code § 16-3-25(C)(3) (1976). § 16-3-25(E) further requires that the Court "include in its decision a reference to those similar cases which it took into consideration."

Despite these statutory requirements, the initial opinion affirming petitioners' sentences of death on September 14, 1981 contained no discussion whatever of the proportionality of the sentences imposed in this case, and no comparisons with the sentences imposed in any other cases. See Appendix A. Sometime later, the Court issued an amended opinion which was in every respect identical with the original opinion but for the insertion of this paragraph:

> We are required under § 16-3-25 to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and defendant." Considering the record in this case and comparing it with State v. Shaw and Roach, 273 S.C. 194 255 S.E.2d 799 (1979), and State v. Hyman, S.C., 281 S.E.2d 209 (1981), we find the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case. We affirm.

(App.B.) As of the date of the opinion the two cases cited were the only cases in which death sentences had been imposed under South Carolina's present death penalty statute and affirmed by the South Carolina Supreme Court. Of these, one involved a double murder in which the aggravating circumstances for armed robbery, kidnapping and rape were all found to be present. It appears, then, that the "similar" cases used for comparative purposes in this case were similar only insofar as they involved sentences of death.

On the other hand, at the time of the death sentences on petitioner, twenty-eight (28) cases in South Carolina involving

the aggravating circumstances of armed robbery and/or larceny with the use of a deadly weapon were final. (See App. I).[1] In only one of these cases had the death penalty been imposed.

The remainder of the appellate review conducted by the S. C. Supreme Court in this case is even more difficult to discern. Nowhere in either of the opinions below can be found any reference to mitigating circumstances nor personal data about the Petitioners. In his statutorily required report to the state supreme court, the trial judge noted that both petitioners had no significant history of prior criminal activity involving the use of violence against other persons. (See App. D. and E.) Nowhere in the opinions below is any reference made to the race of the victim or the Petitioners. The victim was white. The Petitioners are black. (See App. D and E.) In the trial judge's report, he answered in the affirmative the question: "Was there any evidence that members of the defendant's race were systematically excluded from the jury?" The trial judge footnoted his "yes" response with the following, "by peremptory challenges of State." (App. D at 10 and App. E at 10). As a result, the jury was all-white. App. E. at 10.

In Woodson v. North Carolina, 428 U.S. 280, at 304 (1976) this Court said the Eighth Amendment ". . . requires consideration of the character and record of the individual offender . . ." Can the South Carolina Supreme Court have truly considered the proportionality of the death sentences in this case when it ignored the criminal record of the Petitioners and the apparent racial factors in this case?

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1. Appendix I is a list of these cases taken by counsel from a list of all capital cases in the state prepared by the Chief Staff Attorney of the South Carolina Supreme Court. It should be noted that this list includes not only jury sentences but judge imposed sentences involving both full trials and plea bargains.

Equally important in any consideration of the excessiveness of a death sentence is the actual crime involved. See Lockett v. Ohio, 438 U.S. 586 (1978) and Coker v. Georgia, 433 U.S. 584 (1977). South Carolina's highest court neglected to consider any cases in which similar defendants have been spared their lives. In approving the sentence review procedure of Georgia Justice Stewart said,

> If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg v. Georgia, supra, at 206. And in response to Gregg's attack on the Georgia Supreme Court's proportionality of review, Justice Stewart noted the fact that the Georgia Court". . . does consider appealed cases where a life sentence has been imposed." Supra at 204, Fn. 56. Despite the assistance of a Staff Attorney's Office which compiles reports on all capital cases in the state, the South Carolina Supreme Court ignored all of the cases in which a life sentence was imposed.

In Coker v. Georgia, 433 U.S. 584 (1977), this Court held that the death penalty may not be imposed for rape because such a sentence is disproportionate to the crime. Although not determinative of the issue, the Court's decision included a comparison of cases in which both death and lesser sentences were imposed for rape in Georgia. Supra at 596-597. The necessity of such a comparison is the only logical conclusion that can be drawn from Gregg and its progeny. See Woodson v. North Carolina, supra at 316 (J. Rehnquist dissenting).

As Justice Stewart said in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 at 1764 (1980):

> A capital sentencing scheme must, in short, provide a "meaningful basis for distinquishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (citation omitted)
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. (our emphasis)

The decision of the South Carolina Supreme Court and its application of the state statute are in direct conflict with the mandate of Godfrey. To paraphrase Godfrey, there is no principled way to distinquish this case, in which the death penalty was imposed from the many cases in South Carolina in which it was not without much, much more from South Carolina's highest court. Accordingly, review by the Supreme Court of the United States is the only way to insure that Petitioners do not suffer the "arbitrary and capricious" infliction of death by the State of South Carolina.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the order of the Supreme Court of South Carolina.

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Appendix

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No.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix E - Report of Trial Judge as to Petitioner - Gleaton.

Appendix F - South Carolina Death Penalty Statute.

Appendix G - Petition for Rehearing of Petitioner - Gilbert.

Appendix H - Petition for Rehearing of Petitioner - Gleaton.

Appendix I - Table of South Carolina capital cases involving armed robbery and/or larceny with the use of a deadly weapon.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Larry Gilbert and J. D. Gleaton, ... Appellants.

Appeal From Lexington County
Julius Baggett, Judge

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Opinion No. 21562
Filed September 14, 1981

AFFIRMED

Robert W. Mance, III, of Washington, D. C., for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes, and Assistant Attorney General Kay G. Crowe, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

Amicus Curiae: David I. Bruck, of Columbia, for S. C. Commission of Appellate Defense.

NESS, A. J.: This appeal is from a sentencing retrial where the appellants were given death sentences for the armed robbery and murder of Ralph Stoudemire. We affirm.

On previous appeal, appellants' convictions were upheld but their death sentences were vacated and remanded on the basis of improper prosecutorial argument during the sentencing phase of the bifurcated trial. State v. Gilbert, 273 S. C. 490, 256 S. E. 2d 890 (1979). We review pursuant to §16-3-25, mandatory review of sentencing proceedings.

The original opinion in this appeal was written by Justice Harwell and the Court unanimously concurred except for the portion addressing the double jeopardy issue.

Appellants first challenge various rulings by the trial judge concerning the qualifications of certain jurors. The relative competency of a prospective juror to be empanelled for a specific trial is a matter addressed to the sound discretion of the trial judge whose decision will not be disturbed unless wholly unsupported by the evidence. State v. Watkins, 259 S. C. 185, 191 S. E. 2d 135 (1972); State v. Franklin, 267 S. C. 240, 226 S. E. 2d 896 (1976). No abuse of discretion appears.

The appellants claim that the trial judge erred by qualifying a juror even though she allegedly stated during voir dire that she would be unable to consider the lack of a prior criminal record as a factor mitigating against imposition of the death penalty.

This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants' trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

The appellants also claim that the trial judge erred by excusing another of the prospective jurors, who, despite the trial judge's instruction to the contrary, revealed to her priest that she might be serving in a capital case and solicited of him his opinion of the Catholic Church's stance on the issue of capital punishment. There was no abuse of discretion. The possible seating of this person would have introduced an outside influence into the deliberations of this jury.

An assertion is also made that the trial judge erred by failing to disqualify a prospective alternate venireman who read an account of the trial matter in his newspaper during the voir dire process. According to the venireman, the article only stated that the appellants were on trial for determination of the sentence to be imposed on them for the murder of Stoudemire. He testified that nothing in the article had influenced him and that he would have to hear the testimony before he could offer an opinion on the proper sentence. There was no abuse of discretion in qualifying this alternate juror.

Appellants next contend that certain photographs of the crime scene were improperly admitted since they were allegedly irrelevant as to the question of proper sentence and were allegedly designed to inflame the passions of the jury. We disagree. The photographs were properly admitted as evidence of the circumstances of the crimes. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799, cert. denied, 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979), petition for rehearing denied, 444 U. S. 1027, 100 S. Ct. 694, 62 L. Ed. 2d 662 (1980), and cert. denied, 444 U. S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, petition for rehearing denied, 444 U. S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980).

One photograph of the scene was apparently inadvertently admitted after the trial judge ruled it inadmissible because allegedly irrelevant. We find the error harmless, however, since the photograph is simply one more view of the crimes scene, and since it was neither irrelevant nor inflamatory. Like the other photographs it was demonstrative of the circumstances of the crimes. See State v. Campbell, 259 S. C. 339, 191 S. E. 2d 770 (1972).

The appellants contend that they should have been allowed to introduce witnesses to testify why the death penalty is allegedly not a proper form of punishment. This exception has no merit. Nothing in the record supports the contention that appellants even sought to introduce additional witnesses. At any rate, the propriety of the death sentence as a form of punishment is a matter addressed to the discretion of the legislature. The legislature has determined that capital punishment is an appropriate mode of punishment in this State. This Court will not sacrifice judicial resources in considering the philosophical correctness of capital punishment since it has been legislatively approved in a statutory complex we have previously examined and found to be constitutional. State v. Shaw, supra; State v. Linder, Smith's 5/14/81, Op. No. 21452.

Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata. State v. Gilbert, 273 S. C. 690, 258 S. E. 2d 890 (1979).

Finally, appellants allege the trial court violated the constitutional provision against double jeopardy by submitting for the jury's consideration an aggravating circumstance not found by the jury in the first sentencing trial. We disagree.

The double jeopardy clause of the Fifth Amendment basically prohibits reprosecution for the same offense. For the first time the Supreme Court in Bullington v. Missouri, ___ U. S. ___, 101 S. Ct. 1852, 1863 (1981), held the double jeopardy clause applies equally to sentencing and guilt phases of a trial.

At the first trial, two aggravating circumstances were submitted to the sentencing jury but they only found "robbery while armed with a deadly weapon" as an aggravating circumstance. At the second sentencing trial, both "robbery while armed with a deadly weapon" and "larceny with the use of a deadly weapon" were found as aggravating circumstances, to exist beyond a reasonable doubt.

Appellants now assert the trial court erred in submitting the aggravating circumstance of "larceny with the use of a deadly weapon" at the second sentencing trial because the failure of the jury to find for or against him on that issue in the first trial amounted to a finding that this aggravating circumstance did not exist.

We hold there is no merit to appellants' assertion of double jeopardy as the failure of the jury to find for or against him on the aggravating circumstance of larceny with the use of a deadly weapon would not preclude the submission of the other valid aggravating circumstance which was in itself sufficient to call for the application of the death penalty. Gerberding v. Swenson, 435 F. 2d 368, 371 (8th Cir. 1970), cert. denied, 403 U. S. 906, 91 S. Ct. 2211, 29 L. Ed. 2d 682 (1971).

Under the particular facts of this case, appellants' argument that the jury's failure to find for or against him on the issue of larceny with the use of a deadly weapon, at the first sentencing trial, was tantamount to an acquittal on that issue is without merit. Larceny is an essential element of the offense of robbery, as "[t]he common-law offense of robbery is essentially the commission of larceny with force." State v. Brown, 274 S. C. 48, 49, 260 S. E. 2d 719 (1979). Therefore, it was necessary for the jury to have found that appellant had committed a larceny as well as finding the additional element that he used force to accomplish the larceny.

Moreover, we must remember, as held in U. S. v. Tateo, 377 U. S. 463, 466, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964), "[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial."

Two sentencing juries have decided death is the appropriate punishment for appellants. The double jeopardy clause does not protect appellants here. We affirm.

AFFIRMED.

LEWIS, C.J., GREGORY, A.J., and JOSEPH R. MOSS, Acting Associate Justice, concur. HARWELL, A.J., dissents.

HARWELL, A. J. (Dissenting): I respectfully dissent, concluding that the State violated the constitutional provision against double jeopardy[1] in the second sentencing trial by submitting for the jury's consideration an aggravating circumstance which the jury in the first sentencing proceeding had considered but had failed to find to exist beyond a reasonable doubt.

Section 16-3-20(C) of the Capital Punishment Statutory Complex provides in pertinent part: "The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt." (Emphasis added).

The language of Section 16-3-20(C) quoted above mandates that a jury shall designate in writing which of those statutory aggravating circumstances it has found beyond a reasonable doubt. Thus, when several such circumstances are submitted to the jury but a designation as to only a few is made, the only legal conclusion to be drawn is that the undesignated, submitted circumstances were not established beyond reasonable doubt.

The United States Supreme Court recently applied the principles of double jeopardy prohibition to the sentencing portion of the bifurcated capital trial. Bullington v. Missouri, ___ U. S. ___, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). In Bullington the Supreme Court held that once the sentencing jury recommends a life sentence the State may not on retrial of the matter again seek the death penalty. "By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, . . . Missouri explicitly requires the jury to determine whether the prosecution 'has proved its case' . . . . A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final.

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[1]The Fifth Amendment of the United States Constitution provides in part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ."

The South Carolina Constitution at Article I, Section 12 provides in part: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty. . ."

The values that underly this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die . . ." 43 L. Ed. 2d 270 at 282-283. (emphasis in original).[2]

The above statement follows logically from the rule of law as restated in United States v. Di Francesco, ___ U. S. ___, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980):

> "An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation', Arizona v. Washington, 43 U. S., at 503, 54 L. Ed. 2d 717, 98 S. Ct. 824. The law 'attaches particular significance to an acquittal.' United States v. Scott, 437 U. S., at 91, 57 L. Ed. 2d 65, 98 S. Ct. 2187." 66 L. Ed. 2d 328 at 340-341.

For purposes of the double jeopardy guarantee, a recommendation of life is an acquittal as to the death issue.

I believe that the double jeopardy principles must extend to the situation at bar. Burton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) holds that when guilt beyond reasonable doubt is established as to one crime but is not established beyond reasonable doubt as to a second crime tried with the first, then if the defendant obtains a reversal on appeal, he may not be tried a second time for the crime not established at the original trial. See, State v. Kirby, 269 S. C. 25, 236 S. E. 2d 33 (1977). The same rule should be applicable to the aggravating circumstance submitted to a sentencing jury. If the jury recommending death fails to designate one of several aggravating circumstances submitted to it, then if the defendant obtains a vacation of his sentence, on retrial the submitted but undesignated, aggravating circumstance should not be resubmitted to the second jury. The first jury has already determined that existence of the circumstance is not free of reasonable doubt.

The majority gives credence to Gerberding v. Swenson, 435 F. 2d 368, 371 (8th Cir. 1970), cert. denied, 403 U. S. 906, 91 S. Ct. 221, 29 L. Ed. 2d 682 (1971). In Gerberding a second offender statute required that a convicted felon be sentenced according to the maximum punishment if he had previously been convicted of any offense punishable by imprisonment in the penitentiary . The defendant had three prior felony convictions but one was constitutionally infirm because it was obtained by a guilty plea without the assistance of counsel. At the trial for the fourth offense, the prosecution introduced evidence of all three prior convictions, and the maximum punishment was imposed. The defendant alleged that the use of the constitutionally infirm conviction voided the entire later conviction. The Eighth Circuit disagreed. The jury had to find only one prior conviction before it imposed the maximum sentence. Since there were two other valid convictions, the use of the third was merely cumulative. Unlike our Section 16-3-20(C), the jury did not have to designate which of the prior convictions it relied upon to enhance the punishment. In contrast, our Capital Punishment Statutory Complex requires a jury to designate each aggravating circumstance it found beyond a reasonable doubt. A resubmission to the jury of any aggravating circumstance which was found not to exist beyond a reasonable doubt would constitute double jeopardy.[3]

---

[2]Missouri's bifurcated sentencing procedure is similar to the South Carolina statutory procedure.

[3]Any contention that the error is harmless since one other aggravating circumstance was found to exist beyond reasonable doubt is without merit. The jury can recommend life even if an aggravating circumstance is properly established. Thus, we can only speculate as to whether this jury would have recommended death had only the armed robbery circumstance been submitted to it for consideration. This speculation is the sort of arbitrary factor which is intolerable in a case of this nature.

I quote with approval the following observations made by the North Carolina Supreme Court in State v. Silhan, ___ N. C. ___, 275 S. E. 2d 450 (1981):

> "If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates a [sic] double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from. This would be tantamount to the state's having offered insufficient evidence of an essential element of a criminal offense in which case the state, because of double jeopardy considerations, could not retry the defendant even if it had sufficient evidence which could be offered at a new trial. Similarly the prohibition against double jeopardy would preclude the state from relying, at a new sentencing hearing, on any aggravating circumstance the existence of which the jury at the hearing appealed from, upon considering it, failed to find. The jury's failure to find the existence of the aggravating circumstance, after it had considered it, would be tantamount to defendant's having been acquitted of this circumstance."

I would vacate the death sentences of Gilbert and Gleaton and remand the matter for a new sentencing proceeding.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Larry Gilbert and J. D. Gleaton, ... Appellants.

Appeal From Lexington County
Julius Baggett, Judge

Opinion No. 21562
Filed September 14, 1981

AFFIRMED

Robert W. Mance, III, of Washington, D. C., for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes, and Assistant Attorney General Kay G. Crowe, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

Amicus Curiae: David I. Bruck, of Columbia, for S. C. Commission of Appellate Defense.

NESS, A. J.: This appeal is from a sentencing retrial where the appellants were given death sentences for the armed robbery and murder of Ralph Stoudemire. We affirm.

On previous appeal, appellants' convictions were upheld but their death sentences were vacated and remanded on the basis of improper prosecutorial argument during the sentencing phase of the bifurcated trial. State v. Gilbert, 273 S. C. 690, 258 S. E. 2d 890 (1979). We review pursuant to §16-3-25, mandatory review of sentencing proceedings.

The original opinion in this appeal was written by Justice Harwell and the Court unanimously concurred except for the portion addressing the double jeopardy issue.

Appellants first challenge various rulings by the trial judge concerning the qualifications of certain jurors. The relative competency of a prospective juror to be empanelled for a specific trial is a matter addressed to the sound discretion of the trial judge whose decision will not be disturbed unless wholly unsupported by the evidence. State v. Watkins, 259 S. C. 185, 191 S. E. 2d 135 (1972); State v. Franklin, 267 S. C. 240, 226 S. E. 2d 896 (1976). No abuse of discretion appears.

The appellants claim that the trial judge erred by qualifying a juror even though she allegedly stated during voir dire that she would be unable to consider the lack of a prior criminal record as a factor mitigating against imposition of the death penalty.

This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants' trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

The appellants also claim that the trial judge erred by excusing another of the prospective jurors, who, despite the trial judge's instruction to the contrary, revealed to her priest that she might be serving in a capital case and solicited of him his opinion of the Catholic Church's stance on the issue of capital punishment. There was no abuse of discretion. The possible seating of this person would have introduced an outside influence into the deliberations of this jury.

An assertion is also made that the trial judge erred by failing to disqualify a prospective alternate venireman who read an account of the trial matter in his newspaper during the voir dire process. According to the venireman, the article only stated that the appellants were on trial for determination of the sentence to be imposed on them for the murder of Stoudemire. He testified that nothing in the article had influenced him and that he would have to hear the testimony before he could offer an opinion on the proper sentence. There was no abuse of discretion in qualifying this alternate juror.

Appellants next contend that certain photographs of the crime scene were improperly admitted since they were allegedly irrelevant as to the question of proper sentence and were allegedly designed to inflame the passions of the jury. We disagree. The photographs were properly admitted as evidence of the circumstances of the crimes. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799, cert. denied, 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979), petition for rehearing denied, 444 U. S. 1027, 100 S. Ct. 694, 62 L. Ed. 2d 662 (1980), and cert. denied, 444 U. S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, petition for rehearing denied, 444 U. S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980).

One photograph of the scene was apparently inadvertently admitted after the trial judge ruled it inadmissible because allegedly irrelevant. We find the error harmless, however, since the photograph is simply one more view of the crimes scene, and since it was neither irrelevant nor inflamatory. Like the other photographs it was demonstrative of the circumstances of the crimes. See State v. Campbell, 259 S. C. 33, 191 S. E. 2d 770 (1972).

The appellants contend that they should have been allowed to introduce witnesses to testify why the death penalty is allegedly not a proper form of punishment. This exception has no merit. Nothing in the record supports the contention that appellants even sought to introduce additional witnesses. At any rate, the propriety of the death sentence as a form of punishment is a matter addressed to the discretion of the legislature. The legislature has determined that capital punishment is an appropriate mode of punishment in this State. This Court will not sacrifice judicial resources in considering the philosophical correctness of capital punishment since it has been legislatively approved in a statutory complex we have previously examined and found to be constitutional. State v. Shaw, supra; State v. Linder, Smith's 5/14/81, Op. No. 21452.

Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata. State v. Gilbert, 273 S. C. 690, 258 S. E. 2d 890 (1979).

Finally, appellants allege the trial court violated the constitutional provision against double jeopardy by submitting for the jury's consideration an aggravating circumstance not found by the jury in the first sentencing trial. We disagree.

The double jeopardy clause of the Fifth Amendment basically prohibits reprosecution for the same offense. For the first time the Supreme Court in Bullington v. Missouri, ___ U. S. ___, 101 S. Ct. 1852, 1863 (1981), held the double jeopardy clause applies equally to sentencing and guilt phases of a trial.

At the first trial, two aggravating circumstances were submitted to the sentencing jury but they only found "robbery while armed with a deadly weapon" as an aggravating circumstance. At the second sentencing trial, both "robbery while armed with a deadly weapon" and "larceny with the use of a deadly weapon" were found as aggravating circumstances, to exist beyond a reasonable doubt.

Appellants now asserts the trial court erred in submitting the aggravating circumstance of "larceny with the use of a deadly weapon" at the second sentencing trial because the failure of the jury to find <u>for or against</u> him on that issue in the first trial amounted to a finding that this aggravating circumstance did not exist.

We hold there is no merit to appellants' assertion of double jeopardy as the failure of the jury to find <u>for or against</u> him on the aggravating circumstance of larceny with the use of a deadly weapon would not preclude the submission of the other valid aggravating circumstance which was in itself sufficient to call for the application of the death penalty. Gerberding v. Swenson, 435 F. 2d 368, 371 (8th Cir. 1970), cert. denied, 403 U. S. 906, 91 S. Ct. 2211, 29 L. Ed. 2d 682 (1971).

Under the particular facts of this case, appellants' argument that the jury's failure to find for or against him on the issue of larceny with the use of a deadly weapon, at the first sentencing trial, was tantamount to an acquittal on that issue is without merit. Larceny is an essential element of the offense of robbery, as "[t]he common-law offense of robbery is essentially the commission of larceny with force." State v. Brown, 274 S. C. 48, 49, 260 S. E. 2d 719 (1979). Therefore, it was necessary for the jury to have found that appellant had committed a larceny as well as finding the additional element that he used force to accomplish the larceny.

Moreover, we must remember, as held in U. S. v. Tateo, 377 U. S. 463, 466, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964), "[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial."

Two sentencing juries have decided death is the appropriate punishment for appellants. The double jeopardy clause does not protect appellants here.

We are required under §16-3-25 to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and defendant." Considering the record in this case and comparing it with State v. Shaw and Roach, 273 S.C. 194, 255 S.E.2d 799 (1979), and State v. Hyman, Op. No. 21524, filed July 22, 1981, we find the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case. We affirm.

AFFIRMED.

LEWIS, C.J., GREGORY, A.J., and JOSEPH R. MOSS, Acting Associate Justice, concur. HARWELL, A.J., dissents.

HARWELL, A. J. (Dissenting): I respectfully dissent, concluding that the State violated the constitutional provision against double jeopardy[1] in the second sentencing trial by submitting for the jury's consideration an aggravating circumstance which the jury in the first sentencing proceeding had considered but had failed to find to exist beyond a reasonable doubt.

Section 16-3-20(C) of the Capital Punishment Statutory Complex provides in pertinent part: "The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt." (Emphasis added).

The language of Section 16-3-20(C) quoted above mandates that a jury shall designate in writing which of those statutory aggravating circumstances it has found beyond a reasonable doubt. Thus, when several such circumstances are submitted to the jury but a designation as to only a few is made, the only legal conclusion to be drawn is that the undesignated, submitted circumstances were not established beyond reasonable doubt.

The United State Supreme Court recently applied the principles of double jeopardy prohibition to the sentencing portion of the bifurcated capital trial. Bullington v. Missouri, ___ U. S. ___, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). In Bullington the Supreme Court held that once the sentencing jury recommends a life sentence the State may not on retrial of the matter again seek the death penalty. "By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, . . . Missouri explicitly requires the jury to determine whether the prosecution 'has proved its case' . . . . A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final.

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[1]The Fifth Amendment of the United States Constitution provides in part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ."

The South Carolina Constitution at Article I, Section 12 provides in part: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty. . ."

The values that underly this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die . . ." 38 L. Ed. 2d 270 at 282-283. (Emphasis in original).[2]

The above statement follows logically from the rule of law as restated in United States v. Di Francesco, ___ U. S. ___, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980):

> "An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation', Arizona v. Washington, 43 U. S., at 503, 54 L. Ed. 2d 717, 98 S. Ct. 824. The law 'attaches particular significance to an acquittal.' United States v. Scott, 437 U. S., at 91, 57 L. Ed. 2d 65, 98 S. Ct. 2187." 66 L. Ed. 2d 328 at 340-341.

For purposes of the double jeopardy guarantee, a recommendation of life is an acquittal as to the death issue.

I believe that the double jeopardy principles must extend to the situation at bar. Burton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) holds that when guilt beyond reasonable doubt is established as to one crime but is not established beyond reasonable doubt as to a second crime tried with the first, then if the defendant obtains a reversal on appeal, he may not be tried a second time for the crime not established at the original trial. See, State v. Kirby, 269 S. C. 25, 236 S. E. 2d 33 (1977). The same rule should be applicable to the aggravating circumstance submitted to a sentencing jury. If the jury recommending death fails to designate one of several aggravating circumstances submitted to it, then if the defendant obtains a vacation of his sentence, on retrial the submitted but undesignated, aggravating circumstance should not be resubmitted to the second jury. The first jury has already determined that existence of the circumstance is not free of reasonable doubt.

The majority gives credence to Gerberding v. Swenson, 435 F. 2d 368, 371 (8th Cir. 1970), cert. denied, 403 U. S. 906, 91 S. Ct. 221, 29 L. Ed. 2d 682 (1971). In Gerberding a second offender statute required that a convicted felon be sentenced according to the maximum punishment if he had previously been convicted of any offense punishable by imprisonment in the penitentiary . The defendant had three prior felony convictions but one was constitutionally infirm because it was obtained by a guilty plea without the assistance of counsel. At the trial for the fourth offense, the prosecution introduced evidence of all three prior convictions, and the maximum punishment was imposed. The defendant alleged that the use of the constitutionally infirm conviction voided the entire later conviction. The Eighth Circuit disagreed. The jury had to find only one prior conviction before it imposed the maximum sentence. Since there were two other valid convictions, the use of the third was merely cumulative. Unlike our Section 16-3-20(C), the jury did not have to designate which of the prior convictions it relied upon to enhance the punishment. In contrast, our Capital Punishment Statutory Complex requires a jury to designate each aggravating circumstance it found beyond a reasonable doubt. A resubmission to the jury of any aggravating circumstance which was found not to exist beyond a reasonable doubt would constitute double jeopardy.[3]

---

[2]Missouri's bifurcated sentencing procedure is similar to the South Carolina statutory procedure.

[3]Any contention that the error is harmless since one other aggravating circumstance was found to exist beyond reasonable doubt is without merit. The jury can recommend life even if an aggravating circumstance is properly established. Thus, we can only speculate as to whether this jury would have recommended death had only the armed robbery circumstance been submitted to it for consideration. This speculation is the sort of arbitrary factor which is intolerable in a case of this nature.

I quote with approval the following observations made by the North Carolina Supreme Court in State v. Silhan, ___ N. C. ___, 275 S. E. 2d 450 (1981):

> "If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates a [sic] double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from. This would be tantamount to the state's having offered insufficient evidence of an essential element of a criminal offense in which case the state, because of double jeopardy considerations, could not retry the defendant even if it had sufficient evidence which could be offered at a new trial. Similarly the prohibition against double jeopardy would preclude the state from relying, at a new sentencing hearing, on any aggravating circumstance the existence of which the jury at the hearing appealed from, upon considering it, failed to find. The jury's failure to find the existence of the aggravating circumstance, after it had considered it, would be tantamount to defendant's having been acquitted of this circumstance."

I would vacate the death sentences of Gilbert and Gleaton and remand the matter for a new sentencing proceeding.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Larry Gilbert and
J. D. Gleaton,

Appellants.

ORDER

The appellants have been convicted of murder and sentenced to death. The Court affirmed the convictions and sentences in Opinion No. 21562, filed September 14, 1981.

The appellants now petition for a rehearing and stay of remittitur, for a stay of execution, and for withdrawal and substitution of counsel.

We have considered these petitions, and it appears the petition for rehearing and stay of remittitur and the application for stay of execution should be denied. We think the petition for withdrawal and substitution of counsel should be granted.

Therefore the petition for rehearing and stay of remittitur and the application for stay of execution are denied.

We further relieve Robert W. Mance, III, as counsel for appellants and appoint in his place W. Lewis Burke, Vance L. Cowden and Naomi E. Mims for Larry Gilbert and Robert Hallman, Jr. for J.D. Gleaton.

And it is so ordered.

Lewis Ashby
Nat Barrington Curry

CERTIFIED TRUE COPY
Frances Hobrick
Clerk, S. C. Supreme Court

J. Woodrow Lewis C.J.

[illegible] A.J.

[illegible] A.J.

[illegible] A.J.

[illegible] A.J.

Columbia, South Carolina

October 9, 1981.

Appendix C

NOV 21 1977

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ORDER

FILED
APR 14 4 58 PM '80
CHARLES R. SHEALY
CLERK OF COURTS
LEXINGTON, S.C.

RE: DEATH PENALTY SENTENCING REPORT

IT IS ORDERED that the attached questionnaire is adopted for use by the trial judge in all cases in which the death penalty is imposed. This report must be submitted to the Supreme Court within ten (10) days after the receipt of the transcript by the Clerk of the trial court.

/s/ J. Woodrow Lewis C. J.

/s/ Bruce Littlejohn A. J.

/s/ J. B. Nes A. J.

/s/ Wm. L. Rhodes, Jr. A. J.

/s/ George T. Gregory, Jr. A. J.

Columbia, South Carolina

November 18, 1977.

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR Lexington COUNTY,

SOUTH CAROLINA*

The State v. Larry Gilbert

Docket No. 77-GS-32-508

A. Data Concerning the Defendant**

1. Name Gilbert (Last) Larry (First) (Middle) 2. Date of Birth 6 (Mo.) 22 (Day) 55 (Yr.)

3. Social Security Number [ ] 256 92 8167 [ ] Unknown

4. Sex: M [X] F [ ]

5. Race: W [ ] B [X] Other (Specify): _____

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 (9) 10 11 12 (Circle One) 13 14 15 16 (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes [X] No [ ]

If so, is it

a. Below Average [X]
b. Average [ ]
c. Above Average [ ]

8. Was a psychiatric evaluation performed? Yes [X] No [ ]

a. If performed,*** by whom? S. C. State Hospital
b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes [X] No [ ]
(2) Able to cooperate intelligently in his own defense? [X] [ ]
c. If performed, were character or behavior disorders found? [ ] [X]
(If answer is yes please elaborate)

_____

_____

*Attach separate sheets where insufficient space provided for response.
**Separate report must be submitted for each defendant sentenced to death.
***If more than one evaluation was performed, attach a separate response for each evaluation.

9. Does the defendant have a record of prior convictions?

Yes [ ] No [X]

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

	Offense	Date of Offense	Sentence Imposed
1.			
2.			
3.			
4.			
5.			
6.			

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [ ] Nonresident [X]

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on July 13, 1977.

2. Was a preliminary hearing requested? Yes [X] No [ ]

3. Was a preliminary hearing conducted? Yes [X] No [ ]

4. The defendant was indicted at the September, 19 77 Term of the Court of General Sessions for Lexington County, South Carolina.

5. List each charge alleged in the indictment.

a. Armed Robbery

b. Murder

c. _____

d. _____

e. _____

f. _____

6. The defendant was arraigned on September 16, 1977.

a. If not arraigned, did the defendant waive arraignment?

Yes [ ] No [ ] N/A

7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

Yes [X] No [ ]

a. If not, did the defendant waive this right to a three-day sight of the indictment?

Yes [ ] No [ ] N/A

8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?

Yes [X] No [ ]

9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes [X] No [ ]

10. Did the defendant move for a change of venue?

Yes [x] No [ ]

a. If so, was the venue changed?

Yes [ ] No [x]

(1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Lexington County, South Carolina, on October 3, 1977, during the October, 1977 Term of that Court.

2. How did the defendant plead? Guilty [ ]
Not Guilty [x]

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Armed Robbery

(2) Murder

(3) _____

(4) _____

(5) _____

b. The offense(s) of which the defendant was acquitted:

(1) N/A

(2) _____

(3) _____

(4) _____

(5) _____

4. On what date and at what time did the conviction(s) occur?

October 6, 19 77, at

5:15 o'clock, P .m.

D. Data Relating to Sentencing Proceeding*

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury [X] the trial judge [ ]
a new jury [ ] a new trial judge [ ]

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

N/A _____, 19____, at

_____o'clock, _____.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

N/A Yes [ ] No [ ]

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [ ] No [ ]

(b) On what date and at what time was the sentencing proceeding held?

_____ _____, 19____, at

_____o'clock,_____.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____ _____, 19____.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held?

February 18-26, 1980.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes [ ] No [X]

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	Instructed	Found
a. Murder was committed while in the commission of		
(1) Rape	[ ]	[ ]
(2) Assault with intent to ravish	[ ]	[ ]
(3) Kidnapping	[ ]	[ ]
(4) Burglary	[ ]	[ ]
(5) Robbery while armed with a deadly weapon	[X]	[X]
(6) Larceny with use of a deadly weapon	[X]	[X]
(7) Housebreaking	[ ]	[ ]
(8) Killing by poison	[ ]	[ ]
b. Murder was committed by a person with a prior record of conviction for murder.	[ ]	[ ]

	Instructed	Found
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

   Yes [x] No [ ]

4. Was there evidence of mitigating circumstances?

   Yes [x] No [ ]

5. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. [x]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

   c. The victim was a participant in the defendant's conduct or consented to the act. [ ]

   d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. [ ]

   e. The defendant acted under duress or under the domination of another person. [ ]

   f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. [x]

g. The age or mentality of the defendant at the time of the crime(s). [ ]

h. The defendant was provoked by the victim into committing murder. [ ]

i. The defendant was below the age of eighteen at the time of the crime(s). [ ]

j. Other. [ ]

Please explain if (j) is checked.

_____

_____

_____

_____

_____

_____

_____

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances?

Yes [x] No [ ]

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes [x] No [ ]

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes [x] No [ ]

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes [ ] No [x]

b. Under the influence of narcotics or other dangerous drugs? Yes [x] No [ ]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [x] No [ ]

a. If so, check each weapon used

(1) Poison [ ]
(2) Pistol [x]
(3) Rifle [ ]
(4) Shotgun [ ]
(5) Blunt instrument (Describe)

_____ [ ]

(6) Sharp instrument (Describe)

hunting knife [x]

(7) Motor vehicle [ ]
(8) Other (Describe)

_____ [ ]

3. Cause of death. stab wound to heart

4. County in which the body was found. Lexington County

5. County in which the murder occurred if different from county in which the body was found. Same

F. Data Relating to Victim

1. What was the victim's age? 44

2. Was the victim related by blood or marriage to the defendant?

Yes [ ] No [x]

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes [ ] No [x]

4. Was the victim the same sex as the defendant? Yes [x] No [ ]

5. Was the victim physically harmed or tortured? Yes [x] No [ ]

If yes, state nature of harm or extent of torture:

Stab wounds to right rib cage, stab wound to center of chest, heart and upper left rib cage and two slashes on the left wrist. Also, bullet wound at the level of the breast or pectoralis muscle.

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

	Name	Mailing Address
a.	Robert W. Mance, III	924 Hampton Street, Columbia, SC 29201
b.		
c.		
d.		

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant [X]
Appointed by court [ ]

a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	Name	Date retained or appointed	Years experience as attorney	Years felony trial experience
(1)	Robert W. Mance, III	7/15/77	8	7
(2)				
(3)				
(4)				

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

N/A

4. Did each counsel serve throughout the trial? Yes [X] No [ ]

a. If not, explain in detail.

H. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. Were members of the defendant's race represented on the petit jury? Yes [ ] No [X]

4. Were members of the defendant's race represented on the jury venire? Yes [X] No [ ]

5. Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes [X]* No [ ]
   *by peremptory challenges of State

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [X]

7. Was there extensive publicity in the community concerning this case? Yes [ ] No [X]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [X]

9. Was the jury sequestered? Yes [X] No [ ]

10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes [X] No [ ]

11. Your general comments concerning the appropriateness of the sentence imposed in this case.

I concur with the finding of fact beyond a reasonable doubt by the Jury that each of the defendants, having previously been found guilty of murder, that the evidence of aggravating circumstances in the case warranted imposition of the death penalty as to each.

12. If the defendant is a female, is she currently pregnant? N/A Yes [ ] No [ ]

    a. If so, the anticipated delivery date is

    _____ _____, 19___.

13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and

    a. His (their) comments are attached [ ]
    b. He (they) stated he (they) had no comments [ ]
    c. He has (they have) not responded [ ]

I. Chronology of Case

			Elapsed Days
1.	Date of offense	July 12, 1977	
2.	Date of arrest	July 13, 1977	1
3.	Date trial began	** February 18, 1980	
4.	Date sentence imposed	February 26, 1980	9
5.	Date post trial motions ruled on	None made	
6.	Date trial judge's report completed	March 31, 1980	34
7.	*Date received by Supreme Court		
8.	*Date sentence review completed		
9.	*Total elapsed days		

*To be completed by Supreme Court

Judge, Court of General Sessions

Lexington County,
South Carolina

March 31, 1980
Date

**Re-sentencing trial (See Report of Hon. Rodney A. Peeples, Presiding Judge, dated 12/28/77). Date case reversed on sentence and remanded for new sentencing trial was October 2, 1979.

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR Lexington COUNTY,

SOUTH CAROLINA*

The State v. J. D. Gleaton

Docket No. 77-GS-32-508

A. Data Concerning the Defendant**

1. Name Gleaton (Last) J.D. (First Middle) 2. Date of Birth 4 (Mo.) 21 (Day) 45 (Yr.)

3. Social Security Number [ ] 248 97 3207 [ ] Unknown

4. Sex: M [x] F [ ]

5. Race: W [ ] B [x] Other (Specify): _____

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 9 10 11 12 (Circle One) 13 14 15 16 (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes [x] No [ ]

If so, is it

a. Below Average [x]
b. Average [ ]
c. Above Average [ ]

8. Was a psychiatric evaluation performed? Yes [x] No [ ]

a. If performed,*** by whom? S.C. State Hospital
b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes [x] No [ ]
(2) Able to cooperate intelligently in his own defense? [x] [ ]
c. If performed, were character or behavior disorders found? [ ] [x]
(If answer is yes please elaborate)

_____

_____

*Attach separate sheets where insufficient space provided for response.
**Separate report must be submitted for each defendant sentenced to death.
***If more-than one evaluation was performed, attach a separate response for each evaluation.

9. Does the defendant have a record of prior convictions?

Yes [x] No [ ]

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

	Offense	Date of Offense	Sentence Imposed
1.	Destruction of Personal Property	5-5-65	6 months
2.			
3.			
4.			
5.			
6.			

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [ ] Nonresident [x]

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on July 13, 1977.

2. Was a preliminary hearing requested? Yes [x] No [ ]

3. Was a preliminary hearing conducted? Yes [x] No [ ]

4. The defendant was indicted at the September, 1977 Term of the Court of General Sessions for Lexington County, South Carolina.

5. List each charge alleged in the indictment.

a. Armed Robbery

b. Murder

c. _____

d. _____

e. _____

f. _____

6. The defendant was arraigned on September 16, 19 77.

a. If not arraigned, did the defendant waive arraignment?

Yes [ ] No [ ] N/A

7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

Yes [x] No [ ]

a. If not, did the defendant waive this right to a three-day sight of the indictment?

Yes [ ] No [ ] N/A

8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?

Yes [x] No [ ]

9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes [x] No [ ]

10. Did the defendant move for a change of venue?

Yes [x] No [ ]

a. If so, was the venue changed?

Yes [ ] No [x]

(1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Lexington County, South Carolina, on October 3, 19 77, during the October, 19 77 Term of that Court.

2. How did the defendant plead? Guilty [ ]
Not Guilty [x]

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Armed Robbery

(2) Murder

(3) _____

(4) _____

(5) _____

b. The offense(s) of which the defendant was acquitted:

(1) N/A

(2) _____

(3) _____

(4) _____

(5) _____

4. On what date and at what time did the conviction(s) occur?

October 6, 19 77, at

5:15 o'clock, P .m.

D. Data Relating to Sentencing Proceeding*

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury [X] the trial judge [ ]
a new jury [ ] a new trial judge [ ]

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

N/A _____, 19____, at

_____o'clock, _____.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

N/A Yes [ ] No [ ]

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [ ] No [ ]

(b) On what date and at what time was the sentencing proceeding held?

_____ _____, 19____, at

_____o'clock,_____.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [ ] No [ ]

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____ _____, 19____.

c. If conducted before a new jury,.

(1) On what date was the sentencing proceeding held?

February 18-26, 19 80.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes [ ] No [X]

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	Instructed	Found
a. Murder was committed while in the commission of		
(1) Rape	[ ]	[ ]
(2) Assault with intent to ravish	[ ]	[ ]
(3) Kidnapping	[ ]	[ ]
(4) Burglary	[ ]	[ ]
(5) Robbery while armed with a deadly weapon	[X]	[X]
(6) Larceny with use of a deadly weapon	[X]	[X]
(7) Housebreaking	[ ]	[ ]
(8) Killing by poison	[ ]	[ ]
b. Murder was committed by a person with a prior record of conviction for murder.	[ ]	[ ]

	Instructed	Found
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

   Yes [x] No [ ]

4. Was there evidence of mitigating circumstances?

   Yes [x] No [ ]

5. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. [x]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

   c. The victim was a participant in the defendant's conduct or consented to the act. [ ]

   d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. [ ]

   e. The defendant acted under duress or under the domination of another person. [ ]

   f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. [x]

g. The age or mentality of the defendant at the time of the crime(s). [ ]

h. The defendant was provoked by the victim into committing murder. [ ]

i. The defendant was below the age of eighteen at the time of the crime(s). [ ]

j. Other. [ ]

Please explain if (j) is checked.

_____

_____

_____

_____

_____

_____

_____

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances?

Yes [x] No [ ]

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes [x] No [ ]

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes [x] No [ ]

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes [ ] No [x]

b. Under the influence of narcotics or other dangerous drugs? Yes [x] No [ ]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [x] No [ ]

a. If so, check each weapon used

(1) Poison [ ]
(2) Pistol [x]
(3) Rifle [ ]
(4) Shotgun [ ]
(5) Blunt instrument (Describe)

_____ [ ]

(6) Sharp instrument (Describe)

hunting knife [x]
(7) Motor vehicle [ ]
(8) Other (Describe)

_____ [ ]

3. Cause of death. stab wound to heart

4. County in which the body was found. Lexington County

5. County in which the murder occurred if different from county in which the body was found. Same

F. Data Relating to Victim

1. What was the victim's age? 44

2. Was the victim related by blood or marriage to the defendant?

Yes [ ] No [x]

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes [ ] No [x]

4. Was the victim the same sex as the defendant? Yes [x] No [ ]

5. Was the victim physically harmed or tortured? Yes [x] No [ ]

If yes, state nature of harm or extent of torture:

Stab wounds to right rib cage, stab wound to center of chest, heart and upper left rib cage and two slashes on the left wrist. Also, bullet wound at the level of the breast or pectoralis muscle.

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

	Name	Mailing Address
a.	Robert W. Mance, III	924 Hampton Street, Columbia, SC 29201
b.		
c.		
d.		

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant [X]
Appointed by court [ ]

a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	Name	Date retained or appointed	Years experience as attorney	Years felony trial experience
(1)	Robert W. Mance, III	7/15/77	8	7
(2)				
(3)				
(4)				

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

N/A

4. Did each counsel serve throughout the trial? Yes [X] No [ ]

a. If not, explain in detail.

H. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [x]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

3. Were members of the defendant's race represented on the petit jury? Yes [ ] No [x]

4. Were members of the defendant's race represented on the jury venire? Yes [x] No [ ]

5. Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes [x] No [ ]
*by peremptory challenges of State

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

7. Was there extensive publicity in the community concerning this case? Yes [ ] No [x]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [x]

9. Was the jury sequestered? Yes [x] No [ ]

10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes [x] No [ ]

11. Your general comments concerning the appropriateness of the sentence imposed in this case.

I concur with the finding of fact beyond a reasonable doubt by the Jury that each of the defendants, having previously been found guilty of murder that th evidence of aggravating circumstances in the case warranted imposition of the death penalty as to each.

12. If the defendant is a female, is she currently pregnant? N/A Yes [ ] No [ ]

a. If so, the anticipated delivery date is

_____ _____, 19___.

13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and

a. His (their) comments are attached [ ]
b. He (they) stated he (they) had no comments [ ]
c. He has (they have) not responded [ ]

I. Chronology of Case

			Elapsed Days
1.	Date of offense	July 12, 1977	
2.	Date of arrest	July 13, 1977	1
3.	Date trial began	**February 18, 1980	
4.	Date sentence imposed	February 26, 1980	9
5.	Date post trial motions ruled on	None made	
6.	Date trial judge's report completed	March 31, 1980	34
7.	*Date received by Supreme Court		
8.	*Date sentence review completed		
9.	*Total elapsed days		

*To be completed by Supreme Court

Julius H. Baggett
Judge, Court of General Sessions

Lexington County,
South Carolina

March 31, 1980
Date

**Re-sentencing trial (See Report of Hon. Rodney A. Peeples, Presiding Judge, dated 12/28/77). Date case reversed on sentence and remanded for new sentencing trial was October 2, 1979.

Appendix F

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder or a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(b) Mitigating, circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

HONORABLE JULIUS BAGGETT, JUDGE

THE STATE,

RESPONDENT,

-VS-

LARRY GILBERT AND J. D. GLEATON,

APPELLANTS, OF WHOM LARRY GILBERT IS PETITIONER.

PETITION FOR REHEARING AND STAY OF REMITTITUR OF OPINION NO. 21562 FILED SEPTEMBER 14, 1981

The Appellant respectfully petitions this Court for a rehearing of his appeal. In compliance with Supreme Court Rule 17, section 2 includes (a) the attached certificate of merit and (b) the following points which were either overlooked or misunderstood in Opinion No. 21562:

Appendix G

1. The Court failed to comply with their statutory duty under S.C. Code § 16-3-25 to determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

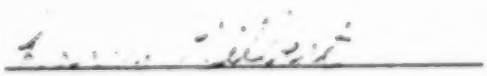
2. The Court failed to comply with their statutory duty under S.C. Code § 16-3-25 to determine whether the evidence supports the jury's finding of the statutory aggravating circumstance of murder committed in the commission of a robbery while armed with a deadly weapon.

3. The Court failed to comply with their statutory duty under S.C. Code § 16-3-25 to determine whether the evidence supports the jury's finding of the statutory aggravating circumstance of murder while in the commission of larceny with use of a deadly weapon.

4. The Court failed to fulfill their statutory obligation to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in which the death penalty was not imposed.

WHEREFORE, Petitioner requests that this Honorable Court consider the above matters and grant him a reconsideration of the above-captioned appeal.

Respectfully submitted,



September 27, 1981

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

HONORABLE JULIUS BAGGETT, JUDGE

THE STATE,

RESPONDENT,

-VS-

LARRY GILBERT AND J. D. GLEATON,

APPELLANTS, OF WHOM J. D. GLEATON IS PETITIONER.

PETITION FOR REHEARING AND STAY OF REMITTITUR OF OPINION NO. 21562 FILED SEPTEMBER 14, 1981

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Appendix H

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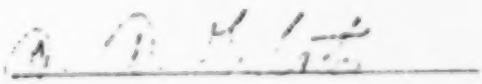
Respectfully submitted,



September 24, 1981

APPENDIX I

South Carolina murder convictions, now final, involving armed robbery and/or larceny with use of deadly weapon as sole aggravating circumstance, with sentence imposed: 10/77 - 9/81. (Source: Alphabetical listing of death penalty prosecutions, South Carolina Supreme Court, September, 1981.)

Case	County	Sentence
State v. Washie Allen	Dorchester	Life
State v. Donald Anderson	Charleston	Life
State v. Sammie Lee Butler	Colleton	Life
State v. Renard Best	Horry	Life
State v. Carlton Davis	Georgetown	Life(2)
State v. Allen DeRoin	Lancaster	Life
State v. Frank Dunn	Anderson	Life
State v. Rudolph Frazier	Colleton	Life(2)
State v. Perry Griffin	Edgefield	Life
State v. James H. Geter	Spartanburg	Life
State v. Wayne Henderson	York	Life
State v. William Gibbs Hyman	Charleston	Death
State v. Charles Edward Hiott	Richland	Life
State v. William Joel Jackson	Anderson	Life
State v. Ferre Lee Laney	Aiken	Life
State v. Maurice Muck	Sumter	Life(2)
State v. Harrison Moore	Marion	Life
State v. Carl William Pauls	Jasper	Life
State v. Lawrence Rabon	Charleston	Life
State v. Walter Edward Ruff	Richland	Life
State v. Robert James Reynolds	Spartanburg	Life
State v. Calvin Smith	Greenville	Life
State v. Weyman Smith	Greenville	Life

Case	County	Sentence
State v. Larry Turner	Spartanburg	Life
State v. Terri Luann Upchurch	Anerson	Life
State v. Melvin West	Edgefield	Life
State v. Shedrick Wigfall	Edgefield	Life
State v. Danny Edward Wilson	Laurens	Life

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5848

LARRY GILBERT AND J. D. GLEATON,

PETITIONERS,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioners, Larry Gilbert and J. D. Gleaton, respectfully move this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavits of petitioners in support of this motion are attached hereto.

Presented herewith is a petition for writ of certiorari of the moving parties.

Respectfully Submitted,

William Lewis Burke, Jr.
School of Law
University of South Carolina
Columbia, South Carolina 29208
Counsel for Petitioner-Gilbert

David I. Bruck
1401 Calhoun Street
Columbia, South Carolina 29201
Counsel for Petitioner-Gleaton

DECEMBER 7th, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5848

LARRY GILBERT AND J. D. GLEATON,

PETITIONERS,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF LARRY GILBERT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Larry Gilbert being first duly sworn, depose and say that I am one of the petitioners in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? "No."

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. "Last day of employment was July 13, 1977, and I earned approximately $480 a month."

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? "Yes."

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. "Prior to my imprisonment I purchased a home through a Farmers Home Administration mortgage for my sister, Carolyn Gleaton of Route 1, Box 38-F, Salley, South Carolina. She made all of the payments on the house. After my imprisonment, the Farmers Home Administration agreed to transfer the title and mortgage to my sister. I received seventy ($70.00) dollars from Farmers Home Administration in this transfer in the early part of 1981."

3. Do you own any cash or checking or savings account? "Yes."

a. If the answer is yes, state the total value of the items owned. "I have approximately eighty-five ($85.00) dollars in my prison account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "No."

5. List the persons who are dependent upon you for support and state your relationship to those persons. "None."

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Larry Gilbert
Larry Gilbert

SWORN TO and subscribed before me
this 4th day of December, 1981

Naomi F. Moss (L.S.)
Notary Public for South Carolina
My Commission Expires: 9/9/87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5848

LARRY GILBERT AND J. D. GLEATON,

PETITIONERS,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF J. D. GLEATON
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, J. D. Gleaton being first duly sworn, depose and say that I am one of the petitioners in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? "No."

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Summer 1976; approximately $480 a month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? "No."

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? "No."

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "No."

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. "None."

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

J. D. Gleaton

J. D. Gleaton

SWORN TO and subscribed before me

this 4th day of December, 1981.

Naomi E. Mims (L.S.)

Notary Public for South Carolina

My Commission Expires: 9/9/87

Opposition

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5848

LARRY GILBERT AND J. D. GLEATON, Petitioners,

vs.

THE STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 30th DAY OF December, 1981

[signature]
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 30th DAY OF December, 1981

Karen H. Kenton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86

INDEX

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CASES INVOLVED

State v. Shaw, 273 S.C. 194, 255 S.E. 2d 799 (1979); cert. den. 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979); reh. den. 444 U.S. 1027, 100 S. Ct. 1027, 100 S. Ct. 694, 62 L. Ed. 662 (1980, cert. den. 444 U.S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, reh. den. 444 U.S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980) ---------- 4

Zant v. Stephens, cert. granted No. 81-89, ___ U.S. ___ (October 5, 1981) ---------- 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

LARRY GILBERT AND J. D. GLEATON, Petitioners,

vs.

THE STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court, not yet reported, appears as Appendix A appended to the Petition for Writ of Certiorari at page 18.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Whether the Supreme Court of South Carolina has correctly determined that Petitioners' double jeopardy rights were not violated in the instant case.

II.

Whether Petitioners' sentence of death violates the Eighth Amendment.

III.

Whether Petitioners received proper proportionality review of their death sentence by the South Carolina Supreme Court.

ARGUMENT

The State of South Carolina, in opposition to the Petition for a Writ of Certiorari in this matter, respectfully submits the following:

I.

Petitioners double jeopardy rights were not violated in the instant case.

II.

The decision of the South Carolina Supreme Court in the instant case does not present the same issue as the one on which this Court has granted certiorari in Zant v. Stephens, cert. granted No. 81-89, U.S. (October 5, 1981).

Respondent respectfully submits that these issues were fully briefed and argued to the South Carolina Supreme Court in the instant case. In this regard, Respondent's Additional Brief on this issue is attached hereto and incorporated herein by reference as Exhibit A.

Petitioners, however, present an additional argument to this Court by assuming that the South Carolina Supreme Court has made a factual determination that the finding of guilt as to the

aggravating circumstance of larceny while armed with a deadly weapon necessarily amounted to a finding of guilt on a lesser included offense to the aggravating circumstance of armed robbery. Respondent respectfully submits that such is not the case.

Respondent contends that the Supreme Court's opinion amounts to no more than a statement that the jury's failure to find for or against Petitioners on the issue of larceny with the use of a deadly weapon did not amount to an acquittal on that count. In essence, the jury did find that larceny had occurred by finding Petitioners' guilty of murder in the commission of armed robbery; and merely failed to find for or against Petitioners on the issue of larceny while armed with a deadly weapon. The dichotomy, and reasoning justifying the submission of these two separate aggravating circumstances are submitted covered in our Brief before the State Supreme Court attached hereto as Exhibit A.

Respondent respectfully submits that Petitioners have presented no justification for this Court's granting of their Petition for Certiorari on these issues.

III.

Petitioners were not denied due process of law by the South Carolina Supreme Court's sentence proportionality review.

Petitioners contend that the South Carolina Supreme Court was required to compare their death sentences with other cases alleged to be "similar" in situation under South Carolina's Death Penalty statute.

Furthermore, this issue has been presented in prior Petitions for Writ of Certiorari to this Court, wherein the South Carolina Supreme Court compared the death sentences of Joseph Carl Shaw and James Terry Roach with all others imposed under South Carolina's present Death Penalty statute, finding no similar cases against which the proportionality of the sentence imposed upon Petitioner could be measured. Those Petitions were denied by this Court. State v. Shaw, 273 S.C. 194, 255 S.E. 2d 799 (1979); cert. den. 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979); reh. den. 444 U.S. 1027, 100 S. Ct. 694, 62 L. Ed. 2d 662 (1980), and cert. den. 444 U.S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, reh. den. 444 U.S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980).

CONCLUSION

Respondent respectfully submits that Petitioners have set forth absolutely no basis justifying allowance by this Court of a Writ of Certiorari. Hence, we respectfully submit said Petitioner is utterly without merit and should be dismissed.

For the foregoing reasons, Respondent respectfully submits that Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Lexington County

Honorable Julius H. Baggett, Judge

THE STATE,

Respondent,

vs.

LARRY GILBERT and
J. D. GLEATON,

Appellants.

ADDITIONAL BRIEF OF RESPONDENT

DANIEL R. McLEOD
Attorney General

LINDY P. FUNKHOUSER
Assistant Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

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Solicitor, Eleventh Judicial Circuit

Lexington County Courthouse
Lexington, South Carolina 29072

ATTORNEYS FOR RESPONDENT.

INDEX

Question Involved ---------- ii

Argument ---------- 1

Conclusion ---------- 9

QUESTION INVOLVED

I.

Did the trial court correctly submit the two aggravating circumstances for the jury's consideration in sentencing?

ARGUMENT

I.

The trial court correctly submitted the two aggravating circumstances for the jury's consideration in sentencing.

Appellants contend that the trial court erred in submitting the following two statutory aggravating circumstances for the jury's consideration: (1) robbery while armed with a deadly weapon, (2) larceny with the use of a deadly weapon. They base this exception on two grounds, (1) that submission of the aggravating circumstance of "larceny while armed with a deadly weapon" in addition to armed robbery constituted improper "doubling up" of circumstances so as to create an arbitrary factor in the death sentence handed down by the jury, and (2) that, since the jury who handed down Appellants' original sentence of death found only armed robbery as an aggravating circumstance, submission of the circumstance of "larceny while armed with a deadly weapon", again, constituted double jeopardy in violation of the United States Supreme Court decision in Bullington v. Missouri, __ U.S. __, 29 Cr. Law Rptr. 3023 (filed May 4, 1981).

Appellants presented this issue to the Court only by oral argument; the only brief on this issue having been presented by the South Carolina Office of Appellate Defense in the form of a brief of amicus curiae. Respondent will assume, since this is a capital case, that this Court will consider the issue as having been properly presented by Appellants and respectfully submits that Appellants' death

sentences are entirely valid and should be affirmed by this Court.

Initially, Respondent finds it curious that Appellants assume that larceny while armed with a deadly weapon is a lesser included offense of armed robbery for purposes of their duplicity exception, and paradoxically assume that larceny while armed with a deadly weapon is separate and distinct for purposes of their double jeopardy argument. Respondent respectfully submits that Appellants are correct only in their latter assumption, contending that each of these separate and distinct statutory aggravating circumstances satisfies the test approved by this Court in State v. Lawrence, 266 S.C. 423, 223 S.E. 2d 856 (1976), so that the proof of one simply does not necessitate proof of any of the others and, therefore, one is not a lesser included offense of the other. In this regard, Respondent contends that Appellants are simply in error whey they state that "larceny with a deadly weapon" is a lesser included circumstance of armed robbery; and in citing the decision of this Court in State v. Kelly, ___ S.C. ___, 266 S.E. 2d 417 (1980) for that proposition. First, we respectfully submit that Kelly does not even address the greater-included, lesser-included offense dichotomy surrounding the issue of the propriety of submission of the grand larceny charge in addition to an armed robbery charge. In fact, the decision in that case was submittedly based exclusively on the fact that a jury had been sworn for a trial on an indictment which charged armed robbery, robbery and grand larceny, after which the Solicitor elected to pursue only the armed robbery count. This Court, in citing State v. Charles,

183 S.C. 188, 190 S.E. 466 and Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978), submittedly held only that the effective nolle prosequi of the grand larcency charge after jeopardy had attached with the swearing of the jury simply amounted to an acquittal which prohibited subsequent trial on that offense. In fact, it would rather appear from this Court's discussion in Kelly that no error was seen in charging the defendant with both counts simultaneously.

In fact, the crime of armed robbery is vastly more specific and distinct from the general crime of larceny. In essence, "robbery is larceny from the person by violence or intimidation." Perkins on Criminal Law (2nd Ed.) Chapter 4, Section 2 at page 279 et seq. It is a crime, not only with the element of larceny, but with the elements of being against the person and by violence or intimidation. The crime of larceny, on the other hand, can be against property as well as from the person, the distinction being a factual one as to whether the thing stolen was in the personal control of the person, or merely under the "protection of the house". Perkins, Larceny, Section 2 b. The point to be made is that for Appellant to claim that larceny is a lesser included offense of armed robbery as a matter of law, or that evidence in any case could not be interpreted by a jury as satisfying the elements of either, is submittedly without merit. As to the aggravating circumstances of murder in the commission of armed robbery vis-a-vis murder for the purpose of receiving money or any other thing of pecuniary value, Appellant is correct that some states have found the submission

of this circumstance in addition to armed robbery constitutes improper doubling up" of circumstances so as to create, under some circumstances, an arbitrary factor in the death sentence handed down by the jury.

Respondent does not dispute the fact that this circumstance could be applied to a variety of factual situations wherein armed robbery is not a factor. Again, however, the question always to be resolved is whether or not the evidence could be construed by the jury so as to support the subject circumstance to the exclusion of any other submitted, i e., the existence of an additional element not included in the other circumstances.

In propounding our arguments, Respondent feels it necessary to point out the problems of review of this exception in light of the fact that counsel at trial never moved to quash any of the aggravating circumstances prior to the sentencing proceeding, never objected to but actually acquiesced in the submission of these aggravating circumstances to the jury and never objected to the charge of the court or to the finding of the jury that all three aggravating circumstances had been proven beyond a reasonable doubt from the evidence in this record. Furthermore, Appellants' arguments in this appeal are submittedly deficient in their presentation of the entire issue by alleging only that the jury's imposed sentence was affected by an arbitrary factor in the submission of all three circumstances, but utterly failing to address the issue of whether or not the finding of all three circumstances was consistent with the evidence.

Based upon our discussion, Respondent respectfully submits that the trial court was not only correct, but duty bound to

submit any aggravating circumstance which could be supported by the evidence. Either or both of these two, we contend, could have been assigned evidentiary support by the jury from the evidence presented by the State. The ultimate issue, then, is whether or not the jury could have properly found both to exist consistently, and if so, whether or not their sentence of death was somehow improperly influenced. Respondent respectfully submits that Appellants have made no showing, nor have they ever contended, that the verdicts were inconsistent. Of ultimate importance, however, is Respondent's contention that, even if this Court finds that certain of the aggravating circumstances submitted were improper, such does not compel a reversal of the sentence judgment in this case. In fact, Respondent respectfully submits that even if we are reduced to the one aggravating circumstance of murder in the commission of robbery while armed with a deadly weapon, as Appellants submit we should be, said aggravating circumstance is so well founded that we respectfully submit the ultimate sentence would have been the same. The weighing process, we respectfully submit, was not compromised. Brown v. State, 381 So. 2d 690 (Fla. 1980); Hargrave v. State, 366 So. 2d 1 (Fla. 1978). Their death sentences, therefore, should not fall on this ground.

Appellants next contend that their double jeopardy rights were violated by submission of the larceny while armed with a deadly weapon circumstance. Respondent respectfully submits that Appellants' prior sentences of death, reversed by their request for a new trial on appeal, are not subject to double jeopardy provisions of the United States Constitution or of

the South Carolina Constitution.

On this issue, Appellants essentially claim that the State may not submit as an aggravating circumstance murder while in the commission of a kidnapping under Bullington v. Missouri, supra and Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970). Both cases are clearly distinguishable from this prosecution and Respondent contends that Appellants' arguments are without merit.

In considering Appellants' arguments on this issue it is necessary to refer to the fundamental principles underlying the double jeopardy prohibition.

> The double jeopardy clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969) (footnotes omitted). Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 194, 97 S. Ct. 2221 (1977).

Bullington v. Missouri supra, upon which Appellants heavily rely, does not apply to the facts of this case because it merely holds that, for double jeopardy purposes, a verdict of life imprisonment is equivalent to an acquittal in a capital sentencing procedure which resembles a trial on the issue of guilt or innocence. In this case there has been no "acquittal" as contemplated in Bullington; in fact, Appellants have stood convicted for the ultimate issue in the presentencing hearing, i.e., whether they deserved to live or die. These sentences have been reversed by this Court for grounds other than sufficiency of the evidence, and the double jeopardy clause would not, therefore, bar a retrial on all issues presented in the prior trial.

United States v. Scott, 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978).

In this State a jury is advised that it need only find one statutory aggravating circumstance beyond a reasonable doubt to impose the death sentence in a capital murder trial. The jury is not required to submit as justification for a death sentence all aggravating factors which it finds beyond a reasonable doubt. Also, the sentencing authority may consider the Defendant's character in determining the issue of life or death. State v. Shaw, 273 S.C. 194, 255 S.E. 2d 799, cert. den. 444 U.S. 957, reh. den. 444 U.S. 1027 (1980). Respondent would respectfully submit that since the jury is permitted to find any one or all of a number of aggravating factors to arrive at its verdict of death, a recommendation based upon only one arbitrary factor is not, a fortiori, an implicit finding that no other aggravating factors exist. This is especially true when one considers the fact that the jury is not required to enumerate the Defendant's character as an aggravating circumstance. See Bullington v. Missouri, supra; United States v. Difrancesco, 49 U.S.L.W. 4022, December 9, 1980 (the double jeopardy guarantee does not apply to a sentence which does not amount to an acquittal).

Finally, the State would respectfully call this court's attention to the contention which is implicit in the argument presented by the Defendant on this issue: that a verdict of death in a subsequent prosecution must be consistent with the

verdict of death rendered in the prior reversed conviction. This contention is implicit in the Defendant's argument in the Bullington rationale and his argument on the collateral estoppel principles of Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970). This argument fails to note, however, that where a conviction or sentence has been imposed at a single criminal trial, the double jeopardy guarantee would only apply if the Defendant is receiving multiple punishments for the same offense. Brown v. Ohio, supra. Here there was only one verdict and one sentence, i.e., death. Any greater degree of consistency in a subsequent verdict of death would not be constitutionally required. See Hamling v. United States, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); United States v. Dotterweich, 320 U.S. 277, 88 L. Ed. 48, 64 S. Ct. 134 (1943); Dunn v. United States, 284 U.S. 390, 76 L. Ed. 356, 52 S. Ct. 189, 80 A.L.R. 161 (1932). Cf. Standefer v. United States, ___ U.S. ___, 64 L. Ed. 2d 689, 100 S. Ct. 1999 (1980); Fair v. State, 245 Ga. 868, 268 S.E. 2d 316, cert. den., 100 S. Ct. 407 (1980). Nothing in Ashe v. Swenson, supra, would change this result inasmuch as the cited authority would only apply to relitigation of facts which were the subject of a prior acquittal. As noted in Bullington v. Missouri, supra, a death sentence is not an acquittal.